87-1678

Supreme Court, U.S.
FILED
APR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

W. E. JOHNSON, Warden,

RESPONDENT - APPELLANT,

VS.

CHRISTOPHER DEMOS,

PETITIONER - APPELLEE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT
OF APPEALS

# BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

DON SIEGELMAN
ATTORNEY GENERAL OF ALABAMA

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

## QUESTION PRESENTED

I

Does evidence of a history of substance abuse, without any evidence of an inability to assist his attorney in his defense, require a state court to find that there is a bona fide doubt about the defendant's competency to stand trial under Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)?

## PARTIES

In the Circuit Court of Baldwin County, Alabama, and in the Court of Criminal Appeals of Alabama, the parties were Christopher Demos as Defendant and Appellant, respectively, and the State of Alabama as Plaintiff and Appellee, respectively. In the United States District Court for the Southern District of Alabama, and in the Eleventh Circuit Court of Appeals, the parties were Christopher Demos as Petitioner and Appellee respectively and W. E. Johnson, Warden, as Respondent and Appellant respectively.

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## OPINION BELOW

The decision and opinion of the Eleventh Circuit Court of Appeals, when reported, will be reported as follows:

Christopher Demos v. W. E. Johnson, Warden, ___ F.2d 1206 (11th Cir. 1988)

A copy of the same is also appended to the petition as Appendix "A".

## JURISDICTION

Petitioner seeks review pursuant to this Honorable Court's jurisdiction under 28 U.S.C. §2101(c).

## CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claim involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

## PRACTICAL REASON FOR GRANTING CERTIORARI

1) The Eleventh Circuit's holding which essentially requires a psychiatric evaluation merely on the allegation of prior drug abuse differs radically from other Circuits on this important issue and this conflict needs to be settled by this Court;

2) The Eleventh Circuit's holding that the pre-trial hearing to determine if there was reasonable grounds to doubt Petitioner's competency was not a Pate hearing is erroneous since the procedure followed by the trial court was adequate to protect Petitioner's right not to be tried while incompetent as required by Pate, supra;

3) The Eleventh Circuit's opinion, if left to stand, would require a psychiatric examination into competency to stand trial in most cases

where the defendant is a prior drug abuser;

4) The district court's and the Eleventh Circuit's factual redetermination violated this Court's holding in Maggio v. Fulford, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983), in that the state court's determination of competency was "fairly supported by the record" and should not have been disturbed.

## STATEMENT OF THE CASE

[All page numbers refer to the pages of the State Trial Transcript and all Exhibits refer to the documents contained in the Federal District Court Record.]

### (A)

### COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW

Petitioner was indicted on October 15, 1975, by the Grand Jury of Baldwin County, Alabama, on the charge of

Murder in the First Degree [State Trial Transcript (hereinafter STT), page 172]. He was arraigned on October 20, 1975, and was represented by the Honorable Ernest Bailey and the Honorable Lloyd Taylor [STT, page 174].

After the arraignment, but prior to trial, Petitioner filed a motion for an examination by a private psychiatrist and a motion stating that Petitioner was unable to aid in his defense [STT, page 174, 176]. After a hearing on the motions, both were denied [STT, page 14, 55]. The case proceeded to trial and on November 13, 1975, the jury found Petitioner guilty as charged and it fixed his sentence at life in the penitentiary of the State of Alabama [STT, page 169].

On October 8, 1983, Petitioner filed a habeas petition in the United States District Court for the Southern

District of Alabama [Exhibit 1]. He alleged that he had been denied due process because the state trial court did not grant him a mental examination prior to trial [Exhibit 1], and amended his petition to include a claim that a pre-trial agreement had been reached with the Court regarding the granting of the request for the mental examination and that the agreement had been breached.

Eventually four (4) evidentiary hearings were held on this petition. Evidence and testimony produced at the hearing are explained in detail in the Statement of the Case. However, at the end of the hearings, the district court found that a pre-trial agreement by the state trial court to send Petitioner for a mental examination existed and that the court failed to comply with the agreement.

On appeal, the Eleventh Circuit, in a written opinion decided on January 15, 1988, reversed the district court's granting of the writ on the basis of the alleged pre-trial agreement, but affirmed the granting of the writ on the basis that the State court had failed to comply with this Court's decision in Pate v. Robinson, supra, when it denied the motion for a mental examination prior to trial. From this decision, the Respondents seek certiorari to review the legal conclusion of the Eleventh Circuit.

(B)

STATEMENT OF THE FACTS

Prior to his original trial in state court, Petitioner apparently filed a motion seeking examination by a private psychiatrist on his competency to stand trial because of a purported

history of mental treatment somewhere in Ohio [STT, page 4]. The motion was argued on November 5, 1975, without benefit of any medical records of the prior mental treatment because the records, which had been ordered, had not been received by his defense counsel [STT, page 4]. Defense counsel argued that Petitioner probably had some brain damage from the use of drugs [R-8]. The court decided to continue the hearing on the motion to allow defense counsel additional time to bring forth evidence to support his motion [Stt, page 9]. On November 7, 1975, the court again heard Petitioner's argument, and again Petitioner informed the court that the medical records had not been received [Stt, page 11]. Petitioner withdrew his motion for a private psychiatric examination [STT, page 12] and the court allowed Petitioner to present evidence

on his claim that he was incompetent to presently aid in his own defense [STT, page 14]. Petitioner's only evidence to support his claim of incompetency was the testimony of his mother who stated that Petitioner had undergone psychiatric treatment for sniffing glue [STT, page 15] when he was in the seventh and eighth grade [STT, page 17] and was thirteen years old [STT, page 17]. She testified that when Petitioner was not on glue, he was completely normal and was different from the way he was when he was under the effects of the glue [STT, page 15, 17]. Petitioner was twenty-five years old during the trial of this cause [STT, page 36].

In rebuttal, the State presented the Baldwin County Jailer, Jimmy Hartner, [STT, page 36] who testified that Petitioner did not have access to any glue while incarcerated at the jail

[STT, page 37, 38]. He further testified that Petitioner did nothing out of the ordinary while he was confined at the jail [STT, page 37, 38].

On November 13, 1975, prior to the trial, the court questioned Petitioner on his desire to dismiss his attorneys [STT, page 54]. The court found that his conversation with Petitioner confirmed that he was competent to stand trial [STT, page 55]. Petitioner had earlier stated to the court that he could mentally assist in the conduct of the trial [STT, page 52]. Petitioner was then tried and convicted of the brutal murder of his wife [STT, page 168] where the evidence showed that, just prior to the murder, Petitioner had forced his wife and his stepdaughter to perform unnatural sex acts on each other and then forced them to perform the acts on him [STT, page 132].

After the federal habeas petition was filed, an evidentiary hearing was granted.

The Magistrate eventually found that the state trial court had failed to adequately inquire into Petitioner's competency to stand trial and then recommended that the court hold a hearing to receive evidence on whether Petitioner's competency to stand trial could be determined at this late date [Exhibit 29]. The district court judge adopted the Magistrate's finding that the state trial court had failed to comply with Pate v. Robinson, 383 U.S. 375 (1966) and that the state trial court had failed to carry out the alleged agreement as required by Acosta v. Turner, 666 F.2d 949 (5th Cir. 1982). [Exhibit 32].

On December 19, 1984, Respondent introduced testimony of Dr. Harry

McClaren who stated that Petitioner, at the time of the trial, probably understood that he was under a charge of murder and probably could have assisted his attorneys at the time of trial [Vol. 4, page 26]. However, Dr. McClaren could not give a firm opinion without personally examining the Petitioner [Vol. 4, page 26], although he was able to conclude that the medical records from Ohio, which had been introduced by Petitioner at the evidentiary hearing, would not have established that Petitioner was incompetent to stand trial even if they had been obtained for the original trial [Vol. 4, page 27]. After this hearing, Respondent asked the court to allow it to perform a mental examination on the Petitioner since Dr. McClaren had testified that it was possible to determine his competency if an examination was done [Exhibit 39].

The request for examination was granted [Exhibit 40] and Petitioner was admitted to the Taylor Hardin Medical Facility [Exhibit 42].

A final evidentiary hearing was held on February 27, 1985, in which the Respondent presented testimony by Lester Smith, a Psychologist II with the Alabama Department of Corrections [Vol. 5, page 13], who examined Petitioner when Petitioner was admitted to the prison system shortly after his conviction [Vol. 5, page 14]. He found Petitioner to be operating in the high average range of intellectual capacity [Vol. 5, page 16]. Petitioner was able to communicate effectively and answer most of the questions asked of him [Vol. 5, page 18].

Dr. Harry McClaren also testified at this hearing [Vol. 5, page 19]. He testified that Petitioner was confined

at the medical center for three weeks where his behavior was observed around the clock [Vol. 5, page 30]. Certain x-rays were performed to check for brain damage [Vol. 5, page 30]. All were normal [Vol. 5, page 30]. Dr. McClaren concluded that Petitioner could have responded to specific questions that would have been asked by his defense attorneys at the trial [Vol. 5, page 38]. He also testified that he could find no evidence to suggest that Petitioner was incompetent for trial [Vol. 5, page 30], or any evidence that Petitioner had suffered from a major mental illness [Vol. 5, page 39]. Under questioning by the Magistrate, Dr. McClaren stated that he saw no evidence of mental retardation and then stated that he could not find anything unusual that would have made him unable to work with his lawyers [Vol. 5, page 67].

In its final order, the district court granted the writ on the basis of the pre-trial agreement and ordered the Respondent to either re-try or release the Petitioner [Exhibit 54].

## SUMMARY OF THE ARGUMENT

A history of drug abuse, without more, does not require a state trial court to find that the defendant is incompetent to stand trial. A defendant must at least present sufficient evidence that he is unable to assist his attorneys in his defense before the trial court is required to grant a mental examination. Due process does not require that a psychiatric examination be granted merely because it

is requested; it only requires one when there is a bona fide doubt about the state of defendant's competency.

The Eleventh Circuit's decision in this case conflicts with decisions of other federal courts that have decided the issue raised herein, and since this decision raises the specter of the State having to grant a mental examination everytime a defendant shows that he has abused drugs in the past, this decision needs to be reviewed very closely by this Court.

Lastly, the granting of the writ on the basis that the trial court erroneously decided the Pate issue in this case apparently conflicts with this Court's prior decision which requires the federal courts to accept the findings of the State Courts if those findings are "fairly supported by the record". The district court and the

Eleventh Circuit overturned the state court's decision merely because they drew a different inference from the evidence; neither court found that the trial court's decision was totally unsupported by the evidence.

## ARGUMENT

### I.

### (A)

### MERE EVIDENCE OF A HISTORY OF SUBSTANCE ABUSE, WITHOUT MORE, DOES NOT REQUIRE A STATE TRIAL COURT TO FIND THAT THERE IS A "BONA FIDE" DOUBT ABOUT DEFENDANT'S COMPETENCY TO STAND TRIAL UNDER PATE V. ROBINSON, 383 U.S. 373, 86 S.Ct. 836, 15 L.Ed.2d 815.

In the seminal case of Pate v. Robinson, supra, this Court held that a trial court is required to sua sponte conduct an inquiry into a defendant's mental capacity if the evidence raises a bona fide doubt as to the defendant's

competency at the time of trial. Later in Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Court apparently lessened the burden of proof for the defendant and, in effect, held that it would constitute a Pate violation if, "in light of what was known to the trial court, the failure to make further inquiry into petitioner's competence to stand trial denied him a fair trial" L.Ed.2d at 115. The question raised by this petition is whether evidence of habitual drug use, without more, raises a bona fide doubt about one's ability to stand trial under Pate or requires the trial court to further inquire into defendant's competency under Drope by ordering a psychiatric examination prior to trial.

This, of course, is a question of first impression for this Court. However, the vast majority of courts

hold that such a defendant is not per se rendered incompetent for trial purposes. For example, in Reed v. U.S., 529 F.2d 1239 (9th Cir. 1976), cert. denied, 429 U.S. 887, 50 L.Ed.2d 169, the court held that the abstract fact that the defendant was either addicted to or under the influence of drugs would not be conclusive on whether he was incompetent to stand trial; the question to be answered was whether the use of drugs impaired his ability to consult with his attorney and effectively assist his attorney in the preparation of his defense. Id, at 1240, 1241.

The Fifth Circuit, like the Ninth Circuit, holds that mere influence of narcotics is not sufficient for a finding of incompetency. In U.S. v. Robinson, 530 F.2d 677 (1976), where a defendant who allegedly had taken heroine two days prior to trial and,

because of such influence, allegedly fell asleep during trial, it was held that the defendant was in fact competent. The court stated:

> "[t]he fact that a defendant is under some influence of narcotics does not per se render that defendant incompetent to stand trial." Id. at 679

In Robinson, the court placed more emphasis upon the questions asked of the defendant and the responses thereto than on the mere fact that he had used drugs prior to the trial.

The Second Circuit, in United States v. Olivier, 626 F.2d 254 (1980), discussed the effect of a prior history of heavy drug use in assessing competency to stand trial, and stated that "[t]he use of drugs is merely a relevant factor in the trial judge's determination". Id. at 259. There, the court concluded that the intelligent

responses to the questions evidenced no confusion or lack of understanding and supported the trial court's finding that a psychiatric examination was not needed to establish competency.

Again, the Ninth Circuit, in Boag v. Raines, 769 F.2d 1341 (1985), held that the defendant, who had attempted suicide five times, who had a history of bizzare behavior and who had a history of alcoholism was properly denied a psychiatric examination because there was no evidence that had caused any mental impairment at the time of trial. Id. at 1343.

In the instant case, the Eleventh Circuit's decision severely conflicts with the decisions of the other circuit courts cited above. At the state trial hearing prior to trial, the only evidence to support Petitioner's claim of incompetency was that he was an

habitual drug user and that, as a teenager, he had undergone substance abuse treatment and psychiatric treatment wherein the psychiatrist had declared Petitioner sane enough to understand right from wrong. Hence, there was simply no basis for the district court or the Eleventh Circuit to find that his prior drug abuse had impaired his present ability to assist in his own defense.

The Eleventh Circuit also erred by considering the fact that Petitioner was under the influence of toluene at the time he committed the crime to help justify its conclusion that Petitioner was incompetent to stand trial:

> "Moreover, at trial the evidence showed that Demos was high on toluene when he committed the crime" [Eleventh Circuit's Opinion, page 1209].

By considering this fact to justify a finding of incompetency, the Eleventh Circuit committed the sin of equating the claim of insanity at the time of the offense with the claim of incompetency to stand trial. The two are distinctly separate claims. See Lee v. State of Alabama, 291 F.Supp. 921 (M.D. Alabama, N.D. 1967), by then District Judge Frank M. Johnson, citing, Dusky v. United States, 363 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Thus, a defendant may have available the defense of insanity at the time of the offense but yet be competent enough to stand trial if he can assist his attorney in his defense. Drope, supra. The Eleventh Circuit simply erred by concluding that Petitioner was unable to stand trial because he was under the influence of a drug at the time he committed the offense.

Secondly, in addition to conflicting with other Circuits, this decision by the Eleventh Circuit does not comport with this Court's holding in Pate v. Robinson, supra. Pate would require a psychiatric examination only if there is enough evidence for a state trial court to find that there is a "bona fide doubt" as to the defendant's competency to stand trial. Since this Court has never prescribed a "general standard with respect to the nature or quantum of evidence" necessary to establish "bona fide doubt", Drope, Id. at L.Ed.2d at 113, the Eleventh Circuit obviously applied a liberal construction of "bona fide doubt" and the effect of its ruling is that any evidence in support of his Pate claim would suffice to require a psychiatric examination. The Respondents believe that in order to establish "bona fide doubt" about his

competency, the Petitioner would have to establish more than the abstract fact the he had abused drugs in the past; he would at least have to present enough evidence to meet the Drope test which requires the defendant to show that he presently is incapable of rationally assisting his attorneys in his own defense. Obviously, Petitioner did not meet this test in the instant case.

(B)

WHETHER THE ELEVENTH CIRCUIT'S INDEPENDENT REVIEW OF THE RECORD TO DETERMINE IF THE STATE COURT'S FINDING WAS CORRECT CONFLICTS WITH THIS COURT'S OPINION IN MAGGIO V. FULFORD, 462 U.S. 11, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983)

In Maggio, supra, this Court held that "[b]efore a federal habeas court undertakes to overturn factual conclusions made by the state court on a Pate issue, it must determine that these

conclusions are not 'fairly supported by the record'". 103 S.Ct. at 2264.

In denying Petitioner's motion for a pre-trial mental examination, the state court, after considering all the evidence held:

> "[The decision] was made on the lack of evidence that was before this court as to his insanity at the time of the crime and to his ability to aid in the conduct of this trial.....The conversation I had with Mr. Demos merely confirms what I had decided" [STT, page 54, 55] [Emphasis added].

In this habeas corpus petition, neither the district court nor the Eleventh Circuit deferred to the state court's finding, but, instead, seemingly made a de novo review of the record and simply drew different inferences from the evidence, without determining whether the inferences drawn by the State Court were supportable by the record.

It should be highly emphasized that of the three factors considered relevant to a determination of competency under Drope, (history of prior irrational behavior, prior medical opinions and demeanor at trial, Id, at 43 L.Ed.2d 118), only prior irrational behavior was supported by evidence at all. This evidence came in the form of Petitioner's mother's testimony about his drug use as a teenager, but she also testified to his normal behavior when there was no use of the drugs. No medical opinions or records were introduced into evidence, although there are disputed questions about whether the lawyers acted diligently enough to procure the records or whether there was inadequate time to obtain them. Regarding the defendant's demeanor at trial, the trial court found that Petitioner was able to assist his

attorneys and this conclusion should have been given upmost deference. In a nutshell, the district court and the Eleventh Circuit overturned the state court's judgement and granted this writ on the basis of a single Drope factor, even though the evidence on this one factor was debatable as to its probity, relevance and weight. Simply, there was no sufficient reason for the federal habeas courts to reverse the state court decision in the case sub judice.

## CONCLUSION

This is not just simply another case seeking certiorari to reverse a lower court decision. Here, the case involves a brutal murder, which, if the State is required to retry, may not be fully prosecutable because of the difficulty of finding the witnesses involved in this 1975 trial. There is

no justice in allowing a brutal act such as involved in this case go unpunished on the basis that the State failed to accord the defendant his constitutional right to be tried while competent when the evidence of incompetency, if there was any at all, was so scant. The position taken by the Fifth Circuit would have been appropriate for the Eleventh Circuit to have taken in this case:

> "We have never suggested that a state court must conduct a full-blown competency hearing everytime there is the slimmest evidence of incompetency."

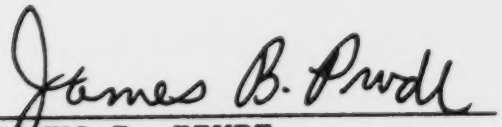
Holmes v. King, 709 F.2d 965, 967 (5th Cir. 1983).

Finally, if this decision is left to stand, it could place an unneeded and onerous burden upon the State financially because a psychiatric examination would be required each time

a defendant presents evidence that he has a background of drug use. In addition, because the federal courts gave no deference to the trial court's observation of petitioner during the pre trial hearings, the trial judge's role in observing the defendant at the hearing would be obliterated from the competency determination process and more credence would be given to the defendant's allegations than to demonstrated fact before the court.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-



JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

Alabama State House
11 South Union Street
Montgomery, Alabama 36130
205-261-7300

## CERTIFICATE OF SERVICE

I, James B. Prude, a member of the Bar of the Supreme Court of the United States, do hereby certify that this 4th day of April, 1988, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Honorable Forrest S. Latta
Nettles, Baker & Janecky
P. O. Box 2987
Mobile, Alabama 36526

I further certify I have served all parties required to be served.

James B. Prude

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

87-1678

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W. E. JOHNSON, Warden,

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CHRISTOPHER DEMOS,

PETITIONER - APPELLEE

# APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT OF APPEALS

# BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

DON SIEGELMAN
ATTORNEY GENERAL OF ALABAMA

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

APPENDIX A

Christopher DEMOS,

Petitioner-Appellee,

v.

W. E. JOHNSON, Warden,

Respondents-Appellants.

No. 86-7726.

United States Court of Appeals,

Eleventh Circuit.

Jan. 15, 1988

Defendant, who had been convicted of murder, filed habeas petition. The United States District Court, Southern District of Alabama, William Brevard Hand, Chief Judge, No. 83-1160-H-B, granted defendant's release subject to retrial. The state of Alabama and defendant appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) alleged pretrial agreement between state trial court and defense counsel to

provide psychiatric examination was not binding, and (2) the trial court's failure to grant psychiatric examination or to make further inquiry into competence denied defendant fair trial.

Affirmed.

1. Mental Health 434.

Alleged pretrial agreement between defense counsel and state trial court to provide defendant with psychiatric examination was not binding; state trial judges have authority to change rulings, and defendant had done nothing to his detriment as result of alleged agreement.

2. Mental Health 434.

Facts before state trial court raised reasonable grounds to doubt murder defendant's competency to stand trial, and thus, trial court's failure

to grant psychiatric examination or to make further inquiry into competence denied defendant fair trial; defendant had moved for psychiatric examination, had history of sniffing glue, had had two prior occasions of psychiatric treatment, and was probably high on toluene when murder was committed. U.S. C.A. Const.Amends. 5, 14; Ala. Code 1975, §15-16-21.

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Appeal from the United States District Court for the Southern District of Alabama.

Before HILL and FAY, Circuit Judges, and allgood, Senior District Judge.

FAY, Circuit Judge:

The State of Alabama challenges the district court's finding that the trial court and defense counsel made a

pre-trial agreement to have petitioner examined by a psychiatrist. It also attacks the district court's determination that in the state trial court there was a violation under Pate v. Robinson 373 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Petitioner, Christopher Demos, cross-appeals asserting that the district court improperly granted a retrial and that he is entitled to an unconditional release. Because we find that there was a Pate violation in the state trial court, we affirm.

## I. BACKGROUND

At approximately 11:00 p.m. on August 20, 1975, Christopher Demos picked up his ex-wife, Edna Demos, and thirteen-year-old stepdaughter at a Taco House Restaurant in Pensacola, Florida. He drove them to their home in Baldwin

County, Alabama, and accompanied them into Edna Demos' house.

Brandishing a kitchen knife he had taken from the Taco House, Demos forced his ex-wife and stepdaughter to perform unnature sex acts on each other and on him. Early the next morning Demos stabbed and killed his ex-wife. Demos' stepdaughter wrapped herself in a quilt, ran to a neighbor's home, and told her of the murder. The neighbor notified the police. When the police arrived, they found Demos nude, under a hall table drinking beer and sniffing a lacquer solvent.

On October 15, 1975, the grand jury of Baldwin County, Alabama, indicted Christopher Demos, charging him with murder in the first degree by stabbing his ex-wife, Edna Demos, to death. At his arraignment before Judge Telfair Mashburn, Demos pleaded not

guilty by reason of insanity. Demos later filed a motion for an examination by a private psychiatrist and a motion stating that he was unable to aid in his defense. At the evidentiary hearing Demos' mother testified that he had regularly sniffed glue since he was twelve years old. She stated that when Demos sniffed glue, he was a completely different person than when he was not on glue. She opined that when on glue, petitioner had violent, depressive, and uncontrollable periods. During cross-examination, she detailed a history of petitioner's criminal activity since becoming dependent on glue. The court also learned that in 1969 two Ohio mental hospitals treated Demos for disorders caused by the chronic abuse of "toluene," the active ingredient in glue and other solvents. After the hearing the court denied both

motions and the case proceeded to trial. On November 13, 1975, the jury convicted Demos and sentenced him to life imprisonment. The Alabama Court of Criminal Appeals affirmed the conviction.

On July 6, 1981, Demos filed a petition for writ of error coram nobis in the Circuit Court of Baldwin County, Alabama, which the court denied. The petition alleged that the trial court deprived Demos due process of law when it denied him a psychiatric evaluation. The Alabama Court of Criminal Appeals affirmed the denial without opinion. The Supreme Court of Alabama denied Demos' petition for certiorari.

Having exhausted his state remedies, Demos filed a habeas petition in the United States District Court for the Southern District of Alabama on October 12, 1983. As with his state petition, Demos alleged a denial of

due process because the state trial court did not grant him a mental examination prior to trial. The district court eventually ordered four evidentiary hearings on this petition. On November 26, 1984, the district court determined the existence of a Pate violation. After the final hearing, the district court also found that a pre-trial agreement existed, and that the state trial court breached this agreement when it failed to send Demos to a state mental hospital for a competency examination.[1] The district court granted petitioner's release subject to retrial by the state

---

[1]The competency hearing ordered by the district court was never held because the district court granted the writ pursuant to its finding on the agreement.

## II. DISCUSSION

### A.

The State of Alabama contends, contrary to the district court's finding, that the state trial court did not breach a pre-trial agreement to provide Demos with a psychiatric examination. Petitioner, on the other hand, asserts that the transcript of the 1975 proceedings supports his claim that the trial judge did reach such an agreement with defense counsel.

The record does not reveal that the trial court ever agreed to provide a psychiatric examination. It does disclose however, two motions filed by defendant. The first motion sought appointment of an "independent" psychiatrist to examine petitioner. The second motion deleted the word "independent." The only indication of an agreement in the record occurred at

the hearing for those motions before Judge Harry J. Wilters. There, the defense counsel advised the court, "I filed a motion asking...that this boy be examined by a private psychiatrist. Then I was told, and understood, that if I revised that motion to have him sent to Searcy [a state mental hospital], it would be agreed to." Volume I of Record at 4 (hearings on motions, November 5, 1975). The record discloses that the agreement allegedly occurred at Demos' arraignment with Judge Mashburn sitting. After the arraignment the case was transferred to Judge Wilters for trial. Judge Wilters denied defendant's motion for a psychiatric examination. The district court found that Judge Wilters breached a pre-trial agreement that defense counsel made with Judge Mashburn.

To support his claim of binding pre-trial agreement, Demos relies on Acosta v. Turner, 666 F.2d 949 (5th Cir. Unit B 1982).[2] In Acosta, the court made an agreement to enter the medical report on defendant's competency to stand trial into the record once the court received the report from the examining physician. Before the court obtained the medical report, defendant's counsel agreed to stipulate to defendant's competency to stand trial after the trial judge promised he would vacate the entire proceedings if the medical report gave any indication that the defendant was incompetent. Id. at 953. The court never received the

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[2]Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in this circuit. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982).

report, and thus never determined the defendant's competency. The jury found the defendant guilty. On appeal the Acosta court held that the state trial judge erred when he failed to assure that the medical report was entered into evidence.

The former Fifth Circuit recognized in Acosta that the defendant had been induced to act to his detriment by relying on the court's agreement. Analogizing the situation to a plea bargaining agreement, the court stated: "If a defendant is induced to plead guilty by a promise of some performance by the prosecution, the defendant has a constitutional right to specific performance of the bargain." Acosta, 666 F.2d at 953 (citing Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)).

[1] We are not persuaded by petitioner's argument. The policy considerations which led to the decision in Acosta are not present in this proceedings. Acosta does not apply situations, such as the alleged agreement in this case, where the court offered no inducement and where petitioner did nothing to his detriment. Further, state trial judges have the authority to change rulings, or to change their minds about rulings. We find that in this case the agreement between defense counsel and the state trial judge was not binding. Therefore, the court did not have to provide Demos with a psychiatric examination on these grounds. We need not reverse, however, because we agree with the district court's finding of a Pate violation in the state trial court.

Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), requires a court to sua sponte conduct an inquiry into a defendant's mental capacity whenever the court learns of facts or events which raise a reasonable ground to doubt defendant's competency. Id. at 387, 86 S.Ct. at 843; see also Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed2d 103 (1975) (explaining Pate). Such information "need not be presented in a formal motion nor argued by defense counsel not be presented to the judge in the form of admissible evidence." Lokos v. Capps, 625 F.2d 1258, 1260 (5th Cir. 1980).[3] This issue is whether, in light of what was known to the trial court, "the

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[3]The Eleventh Circuit in Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial." Drope, 420 U.S. at 174-75, 95 S.Ct. at 905. Under Alabama law, as in Pate, when the facts known to the trial court raise a reasonable ground to doubt petitioner's competence, the court must empanel a jury to conduct a competency hearing. Ala. Code §15-16-21 (1975); cf. Pate, 383 U.S. at 385, 86 S.Ct. at 842 (citing the same procedural requirement under Illinois law where there is a bona fide doubt). In reviewing a Pate challenge, we must make an independent review of the record to determine if the state court's finding was correct. See Price v. Wainwright, 759 F.2d 1549, 1552 (11th Cir. 1985).

[2] In the instant case, the state trial court did not conduct a Pate hearing even though it was aware of facts

which should have raised questions concerning Demos' competence to stand trial. As stated , the state trial court denied Petitioner's motions for psychiatric examination. According to the trial judge, petitioner presented no evidence that he was insane when committing the crimes or that he was unable to aid in his defense. In addition, the judge noted that Demos had earlier stated to the court that he could mentally assist in the conduct of the trial. The judge said this verified that Demos was competent. However, at the evidentiary hearing, the trial court learned from the testimony of Demos' mother that he had been sniffing glue since he was twelve years old.[4] The

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[4]In rebuttal, the State presented the Baldwin County Jailer, Jimmy Hartner, who testified that petitioner did not have access to any glue while incarcerated at the jail. He further testified that petitioner did nothing out of the ordinary while he was confined at the jail.

hearing also disclosed a history of irrational, frequently criminal behavior, and two occasions of prior psychiatric treatment.[5] Moreover, at trial the evidence showed that Demos was high on toluene when he committed the crime.[6] We find that the facts before the trial court raised a reasonable ground to doubt Demos' competency to

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[5]During the few days between arraignment and trial, defense counsel sought a continuance to obtain Demos' records from two Ohio mental institutions. The court denied this request. We are not surprised that defense counsel was unable to obtain these records until long after the trial. Apparently, one institution destroyed Demos' records, but the other set is now available.

[6]Once this evidence came out at trial, defense counsel moved for a mistrial due to the court's erroneous denial of a continuance and of a psychiatrist to aid in petitioner's defense. The court denied these motions. Curiously, the trial judge instructed the jury on the insanity defense.

stand trial. We also find that the trial court's failure to grant a psychiatric examination or to make further inquiry into the accused's competence constituted a Pate violation and denied him a fair trial.

B.

Defendant cross-appeals the district court's granting of a retrial. He argues that the state trial court substantially impaired his ability to maintain a viable insanity defense twelve years later due to the non-existence of any expert medical examination at or near the time of the offense. Petitioner contends that because the state can no longer assure him a fair opportunity to present his insanity defense, the state must now release him unconditionally. The record is void of any district court finding

that a meaningful nunc pro tunc inquiry can or cannot be made regarding petitioner's competency at the time of the offense or at the previous trial. Accordingly, we will not address this issue at this time.

AFFIRMED.

CERTIFICATE OF SERVICE

I, James B. Prude, a member of the Bar of the Supreme Court of the United States, do hereby certify that this 4th day of March, 1988, I did serve a copy of this appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Honorable Forrest S. Latta
Nettles, Baker & Janecky
P. O. Box 2987
Mobile, Alabama 36526

I further certify I have served all parties required to be served.

James B. Prude

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

(3)

Supreme Court, U.S.
FILED
APR 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1678

In The

# Supreme Court of the United States

October Term, 1987

W. E. JOHNSON, Warden,

v. *Petitioner,*

CHRISTOPHER DEMOS,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

April 29, 1988

FORREST S. LATTA
NETTLES, BARKER, JANECKY & COPELAND, P.C.
3300 First National Bank Bldg.
Post Office Box 2987
Mobile, Alabama 36652
Telephone: (205) 432-8786

*Counsel for Respondent Court Appointed*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25pp

## QUESTIONS PRESENTED

1. Whether a state trial court, with knowledge that an indigent defendant's competence to stand trial is a significant issue, has a duty to grant a motion for appointment of a psychiatrist to assist in developing material facts on that issue and/or to make further inquiry into the facts of his competence to determine whether a *Pate* competency hearing should be held.

2. Whether a state court decision on competence to stand trial is entitled to "deference" under 28 U.S.C. § 2254(d) where the state court did not resolve the merits of the dispute, did not employ a factfinding procedure adequate to afford a full and fair hearing, and did not permit adequate development of the material facts.

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In The

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October Term, 1987

87-1678

W. E. JOHNSON, Warden,

v. *Petitioner,*

CHRISTOPHER DEMOS,

*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent Christopher Demos (hereinafter "Demos"), a prisoner of the State of Alabama, was granted a writ of habeas corpus in the United States District Court for the Southern District of Alabama. That judgment was affirmed by the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Demos v. Johnson*, 835 F.2d 840 (11th Cir. 1988). The orders of the

District Court dated November 26, 1984, and September 18, 1986, were not reported and are reproduced in App. A, *infra* 1a-3a.

The Alabama trial and appellate courts issued no opinions in the habeas corpus proceedings. The opinion of the Alabama Court of Civil Appeals affirming the underlying conviction is reported at *Demos v. State*, 57 Ala.App. 588, 329 So.2d 646 (Ala.Civ.App. 1976).

## JURISDICTION

Petitioner invokes the jurisdiction of this Court "under 28 U.S.C. § 2101(c)." Certiorari jurisdiction does exist under 28 U.S.C. § 1257(3).

The petition was filed within ninety (90) days after the judgment and opinion of the Eleventh Circuit Court of Appeals on January 15, 1988. Petitioner did not file an Application for Rehearing.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment of the United States Constitution provides, in pertinent part:

> "[N]or be deprived of life, liberty, or property, without due process of law;"

2. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . life, liberty, or property, without due process of law;"

3. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

4. The United States Code, 28 U.S.C. § 2254(d), provides in pertinent part:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court . . . in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> . . .
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: . . ."

5. The Code of Alabama, Ala. Code § 15-16-21 (1975), provides in pertinent part:

"If any person charged with any felony is held in confinement under indictment and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of such sanity, such jury to be impaneled from the regular jurors in attendance for the week or from a special venire, as the court may direct. If the jury shall find the accused sane at the time of its verdict, it shall make no other inquiry, and the trial in chief shall proceed. If it finds that he is insane at that time, the court shall make an order committing him to the Alabama state hospitals, where he must remain until he is restored to his right mind."

## STATEMENT OF THE CASE

### A. Facts Material to The Questions Presented

On August 21, 1975, Demos was arrested and charged with murdering his former wife. Indigent counsel was appointed at arraignment on October 20, and Demos pleaded "not guilty by reason of insanity." The case was set for trial November 13, 1975.

A week after arraignment, on October 28, Demos filed a motion seeking examination by an "independent" psychiatrist to determine his mental ability to aid in his own defense. A second such motion, dropping the word "independent", was filed October 31.

At a pretrial hearing on November 5 defense counsel advised the court that after he filed the first motion he "was told, and understood, that if I revised that motion to have him sent to Searcy [a state mental hospital], it would be agreed to." He stated, and the prosecutor acknowledged, that the examination agreement was reached with another judge who presided at arraignment. Defense counsel further advised that medical records were being obtained from two mental institutions in Ohio, where Demos was treated in 1969. He stated Demos had "a history of psychiatric treatment" and, in his opinion, "some mental condition, and I think some brain damage from the use of drugs since he was twelve years old."

At a further pretrial hearing on November 7, Demos' mother testified that Demos, age 24, suffered from mental problems caused by the long-term abuse of

toluene.[1] He had "been on glue for 12 or 13 years," which she believed may have caused brain damage[2] and did cause a complete character change since his childhood. Demos had been 7th grade class president before he started sniffing glue.

Mrs. Demos opined that her son had violent, depressive, and uncontrollable periods, and needed further treatment.[3] She also opined, after the judge stated the propriety of such opinions, that Demos was unstable and not "in the state of mind of making a rational decision." Upon cross-examination, she detailed a history of Demos' crime since being addicted to glue. The

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1. Toluene is a liquid aromatic chemical commonly used in certain kinds of glue and solvents.

2. The possibility of residual mental effects in chronic toluene users is documented in medical studies. *See, e.g.*, F.B. Glaser, *Inhalation Psychosis and Related States*, 14 Arch. Gen. Psych. 315 (1966); D.A. Grabski, *Toluene Sniffing Producing Cerebellar Degeneration*, 118 Am. J. Psych. 461 (1961); J. Lewis, D. Moritz & L. Mellis, *Long-Term Toluene Abuse*, 138:3 Am. J. Psych. 368 (1981); R. Satran & V. Dodson, *Toluene Habituation*, 268 New England J. Medicine 719 (1963). That was confirmed by the State's psychiatric expert in evidentiary hearings below. Although he found no brain dysfunction in Demos upon examination 11 years after trial, he could not rule out a possible "residual effect" of Demos' previous toluene abuse, "not having seen him at the time."

3. Mrs. Demos did not testify, as petitioner incorrectly states, that Demos "was completely normal" when not on glue. Pet. for Cert. p.8.

court, however, refused to make any further inquiry into Demos' competency by way of a *Pate* hearing[4] or appointment of a psychiatrist.

Defense counsel thereupon moved for a continuance of the November 13 trial date to allow further time to obtain Demos' records from the two Ohio mental hospitals. The trial court refused the continuance,[5] which produced this exchange:

> "[Counsel]: Your Honor, we need time to get the records here, and by putting a deadline on us of next week when we are operating as indigent counsel without adequate funds to get them here, is an undue injustice on the defendant's rights. And I

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4. Under Alabama law, when the facts known to the trial court raise a reasonable ground to question the accused's competence, the court must empanel a jury to conduct a *Pate* competency hearing. Ala.Code § 15-16-21 (1975). *Cf. Pate v. Robinson*, 383 U.S. 375, 385 (1966)(same statute–new trial ordered); *Brinks v. State of Alabama*, 465 F.2d 446, 450 (5th Cir. 1972)(same statute–new trial ordered). That statute was brought to the trial court's attention by the prosecutor at the time Demos sought a competency hearing.

5. Demos was allowed only eight days (six working days) from November 5, 1975, to obtain his medical records from the two Ohio mental hospitals. The Court of Appeals discussed this, and Demos submits it is virtually a matter of judicial notice that such a deadline for obtaining out-of-state medical records is unrealistic, even today. *See* 835 F.2d at 840 n.5. Indeed, the court's refusal to grant a continuance was independent error. *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974); *Hintz v. Beto*, 379 F.2d 937, 941-43 (5th Cir. 1967).

> feel like Your Honor ought not to limit your continuance to a deadline. If we do not have them by that time, I think we would be entitled to continue beyond that. And it places a burden on us of not knowing whether we are going to have a trial.
>
> [Court]: Does the defendant request a ruling now on your evidence?
>
> [Counsel]: No, sir, its not that. We are requesting Your Honor not to limit us to next week. You are placing an undue burden on us by asking us to get prepared for a trial on an indigent case when we don't know if the evidence is going to be here.
>
> [Court]: *That's the point.* Overrule."

(Emphasis added) Demos' defense counsel, in hearings below, testified that the state judge seemed to have a "thorough understanding . . . that the likelihood of us being [able] to get the information we needed was not going to occur."

On the day of trial, Demos' motions for a psychiatric examination were reconsidered and denied "on the *lack of evidence* that was before this Court as to his insanity at the time of commission of the crime and to his ability to aid in the conduct of this trial." (emphasis added) Demos again objected to the court's denial of a continuance. The evidence at trial showed Demos was high on toluene when the crime occurred and was sitting nude under a table inhaling toluene and drinking beer when apprehended.

At the conclusion of the evidence, Demos moved for a mistrial due to the court's erroneous denial of a continuance and of a psychiatric examination. That motion was denied. The jury, nonetheless, was instructed on the insanity defense. Demos was found

guilty of first-degree murder and sentenced to life in prison.

The conviction was affirmed by the Alabama Court of Civil Appeals, which acknowledged Demos' toluene addiction, but held there was no *Pate* violation or abuse of discretion in denying a continuance. *Demos v. State*, 57 Ala. App. 588, 591, 329 So. 2d 646 (1976). Demos' *pro se* state habeas petition was filed July 6, 1982, asserting in part as follows:

> "That he the petitioner has never had a mental evaluation that was due to him by Respondent and that Petitioner never seen or talked to a psychiatrist and that Petitioner plead not guilty by reasons of insanity. Evaluation could and would have been help on behalf of defense."

It was denied by the same state court judge who presided at trial, and the Alabama Court of Civil Appeals affirmed without opinion. Certiorari was denied without opinion by the Supreme Court of Alabama. *Demos v. State*, No. 83-543 (Ala. April 29, 1983)

**B. Basis for federal jurisdiction**

This habeas petition pursuant to 28 U.S.C. § 2254 was filed October 12, 1983. It raised three constitutional attacks springing from the state's failure to appoint a psychiatrist. First, the court breached a binding pretrial agreement to have Demos examined by a state psychiatrist. Second, it committed a *Pate* violation by failing to hold a competency hearing or make further inquiry into that issue. Third, it committed an *Ake* violation by refusing to appoint a psychiatrist to examine Demos, an indigent, accused of first-degree

murder under which 'state of mind' was an element. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

By order of November 26, 1984, the United States District Court for the Southern District of Alabama determined that a *Pate* violation occurred. By order of September 18, 1986, it further found an unconstitutional violation of the "pretrial examination agreement." The court thereupon granted the writ subject to retrial by the state within 120 days. *See* App. A, *infra* 3a. The Court of Appeals reversed as to the "pre-trial agreement" but affirmed the judgment granting the writ because of the *Pate* violation. The Court of Appeals did not address the *Ake v. Oklahoma* issue, which was raised in the District Court and passed upon in that court's order of November 13, 1986. *See* App. A, *infra* 5a.

## ARGUMENT AGAINST GRANTING THE WRIT

### 1. The Court of Appeals decision does not "conflict" with other federal cases.

Petitioner incorrectly summarizes the Eleventh Circuit's holding as stating: "A history of drug use . . . require[s] a state trial court to find that the defendant is incompetent to stand trial." Pet. for Cert. p.14. To the contrary, and consistent with *Pate* and its progeny, the court held that under the facts known to the state court the "failure to grant a psychiatric examination or to make *further inquiry* into the accused's competence was a *Pate* violation and denied him a fair trial." 835 F.2d at

844. (emphasis added) *See, e.g., Drope vs. Missouri,* 420 U.S. 162, 174 (1975).

The Court of Appeals did not say prior drug abuse equates with legal incompetence. It is, however, a "relevant factor," the court considers in determining whether further inquiry should be made, as petitioner correctly observed. Pet. for Cert. p.19, *citing United States v. Oliver,* 626 F.2d 254, 258-59 (2nd Cir. 1980). That "factor," which alone might be sufficient to raise a reasonable question as to competence in some cases, was only part of the information known to the trial court here.

As petitioner has noted, the state court heard Demos' mother's testimony regarding his chronic glue-sniffing since age 12, the resulting change in his character, and his prior psychiatric treatment at two Ohio institutions. It was stated that such chronic toluene abuse may have caused brain damage,[6] which Demos wanted to determine by way of a psychiatric examination. The court was aware of problems appointed defense counsel was having with Demos refusing to cooperate or speak with him. Demos further displayed bizarre conduct during pretrial hearings, at which he unsuccessfully tried to fire his attorneys and represent himself. Despite such circumstances the trial court refused even to allow Demos, an indigent, a reasonable opportunity to obtain the hospital records from Ohio. When defense counsel protested that eight days

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6. *See* note 2 *supra.*

was insufficent to obtain the out-of-state records, without subpoena power, the court said, "That's the point."

The court likewise denied Demos' motions for a psychiatric examination, despite his indigent status and the presence of significant issues regarding his competence to stand trial and his sanity at the time of the offense. After *Ake v. Oklahoma*, there can be no doubt as to Demos' right to a psychiatric examination under these circumstances. "[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." 470 U.S. at 77. In this case the state did not assure a fundamentally fair trial. It assured the contrary.

**2. The state court's ruling was not entitled to "deference" under 28 U.S.C. § 2254(d)**

The Court of Appeals correctly conducted "an independent review of the record" to decide whether a *Pate* violation occurred. That was the established standard in this circuit, *see Price v. Wainwright*, 759 F.2d 1549, 1552 (11th Cir. 1985), decided in light of *Maggio v. Fulford*, 462 U.S. 111 (1983).

The standard here was determined by the Magistrate in District Court evidentiary proceedings, wherein an order was issued stating in part as follows:

> "B. *Deference and § 2254(d).* Two things are worthy of note here. First, the deference required by 28 U.S.C. § 2254(d) is *not* required here–*compare Maggio v. Fulford*, 462 U.S. 111 (1983)–because as the State Court's ruling makes clear, the denial of the motion for a psychiatric examination was for lack

> of evidence in support of the motion, and was not a factual determination of competency. Second, even if the State Court's ruling were twisted into an affirmative finding of competency, it would *not* be entitled to deference under 28 U.S.C. § 2254(d), since the exception in § 2254(d)(3) clearly applies because the Circuit Judge himself said that the ruling was based upon "*lack of evidence*." [emphasis in original]

That finding was not specifically objected to by Petitioner in the District Court, nor was it an issue raised by Petitioner in the Court of Appeals. It therefore does not seem properly raised on Petition for Certiorari.

In any event, the "presumption of correctness" generally given state court findings of fact does not apply here due to several exceptions in § 2254(d) set forth in the Constitutional and Statutory Provisions Involved *supra*. The state court (1) did not grant Demos a psychiatric examination, (2) did not give him a fair opportunity to obtain records of his prior mental treatment, and (3) did not empanel a jury to decide his competence to stand trial. The facts thus were not "adequately developed," and the state court did not employ a procedure "adequate to afford a full and fair hearing." The proceedings violated due process as well as the right to counsel, under which Demos was entitled to psychiatric assistance by virtue of his indigent status. *See Ake v. Oklahoma, supra.*

Furthermore, the state court denied Demos the opportunity to develop evidence material to the competency issue, and then pretermitted any further inquiry into that issue for "lack of evidence." The error, therefore, involves a decision of law entitled to no deference

under § 2254(d). Furthermore, any ultimate factual determination of competency *vel non* by the trial court would have usurped the jury role under Ala. Code § 15-16-21 (1975), under which Demos was constitutionally entitled to equal protection. The "merits" thus were not resolved, and the court did not afford a full and fair hearing to develop the facts. Under the exceptions in § 2254(d), the state court's actions were not entitled to deference. *Maggio v. Fulford* compels no other result.

## CONCLUSION

Petitioner fails to demonstrate a conflict among the circuits or a question of such public importance as to warrant exercise of certiorari jurisdiction.

Respectfully submitted,

FORREST S. LATTA
NETTLES, BARKER, JANECKY
& COPELAND, P.C.
3300 First National Bank Bldg.
Post Office Box 2987
Mobile, Alabama 36652
Telephone: (205) 432-8786

*Counsel for Respondent*
*Court Appointed*

April 29, 1988

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

| | | |
|---|---|---|
| CHRISTOPHER DEMOS, | ) | |
| Plaintiff, | ) | CIVIL ACTION |
| vs. | ) | NO. 83-1160-H |
| W. E. JOHNSON, et al., | ) | |
| Defendants. | ) | |

ORDER

This case before the Court is a petition for a write [sic] of habeas corpus pursuant to 28 U.S.C. § 2254. The basis for the petition is that petitioner was not competent to stand trial at the time he was convicted in Alabama state court for first degree murder. This contention fuels three attacks on petitioner's conviction.

The first attack is that the state trial court failed to inquire into the petitioner's competency in compliance with *Pate v. Robinson*, 383 U.S. 375 (1966). The second attack is on the state court's failure to order mental examination of the indigent petitioner by an expert psychiatrist. The third attack is on the breach of a specific agreement between the state court and petitioner's defense counsel to have petitioner examined.

The Magistrate conducted an evidentiary hearing, made findings of fact and recommended conclusions of law. The defendant has filed objections to the findings that there was an express agreement to have petitioner examined at Searcy and that petition's [sic] rights under *Pate* were violated. (The Magistrate found it

unnecessary to address the second of petitioner's contentions). Defendants' objection to the finding of an express agreement is premised on the contention that that issue was not raised prior to the hearing, thus denying defendant the right to present controverting evidence. This argument is utterly without merit. The issue was raised in the amended habeas petition filed by petitioner on July 3, 1984. The issue was restated by the Magistrate in his order dated September 18, 1984. The evidentiary hearing was held on October 31, 1984. Defendants' contention that they could not be aware of this issue and be prepared to defend on it are thus difficult to understand. Defendants had over three months to prepare for the evidentiary hearing. No complaints will be heard now because defendants' preparation was inadequate.

The Magistrate's recommendation, with findings of fact, is hereby adopted as the opinion of the Court. Pursuant to that recommendation, the Court finds and determines the existence of a violation of *Pate v. Robinson, supra,* and further finds a violation of the express agreement. The Court therefore ORDERS the holding of a hearing on whether it is too late to hold a *nunc pro tunc Pate* hearing. The Magistrate will set an appropriate date for this hearing.

IT IS SO ORDERED.

DONE this 26 day of November, 1984.

/s/ W. B. Hand
Chief Judge

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

| | | |
|---|---|---|
| CHRISTOPHER DEMOS, Petitioner, vs. W. E. JOHNSON, et al., Respondents. | ) ) ) ) | CIVIL ACTION NO. 83-1160-H-S |

ORDER

Upon consideration of the Supplemental Recommendation of the Magistrate entered on May 16, 1986, the objections filed thereto, and all of the other filings in this action, part one of the Supplemental Recommendation, regarding the pretrial examination agreement, is adopted as the opinion of this Court.

It is ORDERED that Petitioner shall be released forthwith from custody pursuant to the conviction challenged in this action, unless the State retries Petitioner on this charge or charges on or before February 28, 1987. The State shall indicate to this Court within 30 days whether or not Petitioner is to be retried. If an intent to retry is not indicated within 30 days, Petitioner shall be released unconditionally at that time.

IT IS SO ORDERED.

DONE this 18th day of September, 1986.

/s/ W. B. Hand
Chief Judge

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

| | | |
|---|---|---|
| CHRISTOPHER DEMOS, Petitioner, | ) | CIVIL ACTION |
| vs. | ) | NO. 83-1160-H-S |
| W. E. JOHNSON, et al., Respondents. | ) | |

ORDER

Respondents have filed a notice of appeal in this action. Petitioner, Christopher Demos, has filed a notice of cross-appeal, along with a motion that he be permitted to continue his in forma pauperis status.

Normally, appeals from final judgments in habeas corpus proceedings under 28 U.S.C. § 2254 may not proceed unless a certificate of probable cause is issued. 28 U.S.C. § 2253. It is not necessary, however, for the state or its representative to obtain such a certificate when appealing. *Texas v. Graves*, 352 F.2d 514, 515 (5th Cir. 1965). Therefore, this Court must determine only whether a certificate of probable cause should issue for petitioner's cross-appeal.

In order for a court to issue a certificate of probable cause, the habeas petitioner must "make a 'substantial showing of the denial of [a] federal right.' " *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394, 77 L. Ed. 2d 1090, 1104 (1983). In this case the Court finds that petitioner has made such a showing. As petitioner has indicated in his motion to alter or amend judgment, filed September 29,

1986, and his opposition to the motion to stay, filed October 29, 1986, *Ake v. Oklahoma*, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), provides independent grounds for sustaining this Court's order of September 18, 1986, requiring that petitioner be retried or released. In *Ake*, the Supreme Court held that

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

*Ake*, 105 S. Ct. at 1097.

In petitioner's criminal case, he entered a plea of not guilty by reason of insanity. Thus, it appears that he was denied his constitutional right to the assistance of a psychiatrist in his defense. Although this Court relied only on the breach by the State of an express agreement that defendant would receive an independent psychiatric examination as grounds for requiring a new trial, *Ake* apparently provides independent justification for requiring a new trial, or perhaps, as petitioner argues, his unconditional release. In any event, the Court finds that petitioner has made a substantial showing of the denial of a federal right. Therefore, the Court certifies, pursuant to 28 U.S.C. § 2253, that there is probable cause for petitioner's cross appeal.

Federal Rule of Appellate Procedure 24(a) and 28 U.S.C. § 1915(a) both provide that appeals may not be taken in forma pauperis if the district court certifies that the appeal is not taken in good faith. For the

reasons already discussed above, the Court certifies, pursuant to 28 U.S.C. § 1915(a), that petitioner's cross-appeal is taken in good-faith. Petitioner shall be permitted to proceed in forma pauperis.

It is so ORDERED.

DONE this 13th day of November, 1986.

/s/ W. B. Hand
Chief Judge